

RE: Harpers Ferry ballots

Donald Kersey <DKersey@wvsos.com>

Fri 11/15/2019 12:49 PM

To: Brad McElhinny <Brad.McElhinny@wvradio.com>; Mike Queen <MQueen@wvsos.com>;

Hi Brad,

The Secretary of State's position remains the same as articulated in our amicus brief filed in the Circuit Court appeal: W. Va. Code § 3-1-41(e) requires the Board of Canvassers to disregard technical errors, oversights and omissions. Based on the Circuit Court's decision, the evidence was such that the provisional ballots in question were properly cast by eligible, registered voters of the Town and should have been counted at canvass. It has been over five months since the ballots were cast and they should be counted as soon as possible because the voters deserve finality in their election.

However, our Office respects due process of law and understands that our judicial system has checks and balances in place that take time. The Circuit Court scheduled oral arguments for next week, so hopefully we will have a final resolution soon.

Regarding the recent issue of provisional ballot storage, it's my understanding based on public information that the ballots were secured by the Jefferson County Sheriff's Department out of an abundance of caution to provide an added layer of impartiality and security while the court decisions are pending.

I believe it would be improper at this time for our Office to opine on the propriety of the provisional ballot storage. I will state that the integrity of ballots is a supreme concern and integral to instilling confidence in all election. To that end, I learned that the ballots and other elections-related materials were in the Recorder's office, which room is routinely locked. The provisional ballot envelopes at issue remain sealed with the signatures of the Board of Canvassers signed across the seal, and the Sheriff's Office did not provide me with any information that indicates the provisional ballot envelopes appear to be tampered with. At this juncture, it is up to the courts to decide whether an examination of the ballots is necessary.

The law on ballot storage can be found at W. Va. Code § 3-6-9(i), which provides:

After the board of canvassers has made their certificates and declared the results as hereinafter provided, they shall deposit the sealed packages of ballots, absent voter ballots, registration records, pollbooks, tally sheets and precinct certificates with the [town Recorder or Clerk] from whom they were received, who shall carefully preserve them for twenty-two months[.]

According to that provision, the only statutory guidance given to election officials for storing ballots is to "carefully preserve them" As I understand the instant concern, it centers around *where* in the Recorder's office the provisional ballots were kept. There is apparently a discrepancy over why the provisional ballots were not stored in a safe, but instead kept in a filing cabinet in the otherwise-locked Recorder's office.

Certainly our Office recommends that all efforts be made to establish strong security measures for storing elections materials, but the law gives election officials some discretion as to how to "carefully preserve" the election returns. As stated above, the ultimate decision of whether the ballots are reliable under the circumstances is left to the courts to decide.

Best,
Deak

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Donald M. Kersey, III

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From: Brad McElhinny <Brad.McElhinny@wvradio.com>**Sent:** Friday, November 15, 2019 9:05 AM**To:** Donald Kersey <DKersey@wvsos.com>; Mike Queen <MQueen@wvsos.com>**Subject:** Harpers Ferry ballots

Hi Deak and Mike,

I understand the ballots in Harpers Ferry have now been secured by the Jefferson County Sheriff's Department. I spoke this morning with Sheriff Doherty, but I wondered about the view of the Secretary of State's Office.

Are there any concerns about how the ballots were previously stored, given the passage of time?

Is there any indication that any ballots have been opened or lost, or do things seem all right?

Should there have been additional steps previously to assure the security of the ballots during this lengthy process?

Does the Secretary of State's Office have a position on whether a recount should occur right away, as per the order of the circuit judge, or hold off given the appeal to the Supreme Court?

Thank you for your continued guidance,

Brad